91-1961

Supreme Court, U.S.
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IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1991

KEVIN L. CARPENTER,

PETITIONER,

v.

THE PEOPLE OF THE STATE OF ILLINOIS,

RESPONDENTS.

PETITION FOR WRIT OF CERTIORARI TO THE APPELLATE COURT OF ILLINOIS, FIFTH DISTRICT

AMENDED PETITION FOR WRIT OF CERTIORARI

Attorney for Petitioner:
RONALD A. NIEMANN
NIEMANN and PARKER
Counsel of Record
830 E. Noleman
P.O. Drawer G
Centralia, IL 62801
(618) 533-0466

QUESTIONS PRESENTED FOR REVIEW

Whether the defendant's acquittal of Home Invasion in Counts II and IV(III) stands as a final and complete judgement barring conviction of Home Invasion on Counts I and III(IV) which Counts allege the same course of conduct in but a single act by the defendant?

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OPINIONS BELOW

1. Trial Court: Guilty Jury Verdicts on Counts I and III (IV).

Not Guilty Jury Verdicts on Counts II and IV(III)

On posttrial hearing trial judge ruled verdicts inconsistent and allowed the acquittal on Counts II and IV (III) to stand as the final judgement and set aside the guilty verdicts on Counts I and III (IV).

2. The opinion of the Appellate Court of Illinois, Fifth Judicial District, reversing the trial court decision, is contained in Appendix A.

3. The denial of Petition for Leave to Appeal by the Illinois Supreme Court is contained in Appendix B.

STATUTE INVOLVED

Ill. Rev. Stat. (1987) Ch. 38 par. 12-11(a)

"A person who is not a peace officer acting in the line of duty commits home invasion when without authority he or she knowingly enters the dwelling of another when he or she knows or has reason to know that one or more persons is present and

(1) While armed with a dangerous weapon uses force or threatens the imminent use of force upon any person or persons within such dwelling place whether or not injury occurs, or

(2) Intentionally causes any injury to any person or persons within such dwelling place."

CONSTITUTIONAL PROVISIONS INVOLVED

U.S. Constitution Amendment V:

"No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation."

Illinois Constitution of 1970, Art. I, Sec. 10:

"No person shall be compelled in a criminal case to give evidence against himself nor be twice put in jeopardy for the same offense".

JURISDICTION

The opinion of the Illinois Supreme Court was entered on February 5, 1992.

The jurisdiction of the United States Supreme Court is involved under 28 U.S.C. 1257.

STATEMENT OF THE CASE

On February 29, 1988 the Defendant was charged with four Counts of Home Invasion in Jefferson County, Illinois, Second Judicial Circuit. It is alleged that the defendant violated Ill. Rev. Stat. Ch. 38 par.12-11(a)(2) in Counts II and II. It is alleged that the defendant violated Ill. Rev. Stat. Ch. 38 par. 12-11(a)(1) in Counts III and IV. Although Count IV of the Information was mislabeled as a violation of Ill. Rev. Stat. Ch. 38 par. 11(a)(2). The allegation against the defendant in Count IV is exactly the same as Count III, except a different person is named as the potential victim. Count V was dismissed at the close of the State's case because there was no evidence presented that the defendant entered 1309 South 26th St. in Mt. Vernon, Illinois on February 28, 1989 with the intent to commit the felony of criminal damage to property as alleged.

A jury returned a verdict of Guilty against the defendant on Home Invasion in

Counts I and III and on the same conduct of Home Invasion, Not Guilty on Counts II and IV. The Jury found the defendant Guilty of lesser offenses of battery and of Criminal Trespass to a residence. The evidence showed only a single entry by the defendant at 1309 South 26th Street in Mt.Vernon, Illinois on February 28, 1988.

Defendant filed a post trial motion which, among other alleged errors, it was pointed out that the verdicts with respect to the four counts of home invasion were legally inconsistent. The Trial Judge thereafter vacated the guilty verdicts on Counts I and III. The court then sentenced the defendant on the lesser offenses. The State's Motion to Reconsider was denied.

On appeal to the Fifth District Court of Illinois the court ruled that the verdicts were not inconsistent and reinstated the guilty verdict in Count I and remanded to the trial court for sentencing.

REASON FOR GRANTING WRIT

The trial court was correct to rule that the finding of guilty by verdict of Home Invasion as charged in Counts I and III(IV) were legally inconsistent with the finding of Not Guilty by verdict of Home Invasion as charged in Counts II and IV(III), where only one entry was made in the dwelling and the defendant was involved in but a single course of conduct.

In a criminal case, a verdict is improper where one act results in the conviction of offenses involving mental states that are mutually inconsistent. People v. Hoffer, 106 Ill. 2d 186, 195 (1985) In Illinois this concept has been recognized as the "Hoffer rule". The Hoffer case involved a single victim in a single act giving rise to charges of several offenses in a single trial. The rule declares that it is improper for verdicts to suggest that at once a fact exists and then again, that it doesn't.

By definition, the offense of Home Invasion requires that the offender enter the dwelling place of another without authority, knowing or having a reason to know, that one or more persons are present, and while armed with a dangerous weapon uses force or threatens the imminent use of force on any person therein, Ill.Rev. Stat. Ch. 38 par. 12-11(a)(1), or intentionally injures any person or person within the dwelling place, Ill. Rev. Stat. Ch. 38par. 12-11(a)(2). The interpretation of the wording of this statute, to reflect the legislative intent, is to impose only one count of Home Invasion for one unlawful entry of one dwelling regardless of the number of person present or harmed. People v.Ammons, (1983) 120 Ill. App. 3d 855, 458 N.E.2d 1031. This rationale was reaffirmed in People v Morrison, (1985) 137 Ill. App.3d 171, 484 N.E.2d 329, where the Court reversed six of the defendant's seven convictions for home invasion when the record showed that defendant had made but a single

entry into the same dwelling although more than one person was present. It was held in a Fifth Appellate District State of Illinois case, People v. Hawkins, (1984) 126 Ill. App. 3d 520, 522, that "in our opinion,the single entry, although coupled with the injury of more than one occupant in the dwelling, constituted but a single offense,...".

The court further stated in Hawkins at page 523,

> "But the Home invasion statute refers to 'person' or 'persons'as potential victims, while armed robbery refers to 'person', which indicates that only one offense can be carved from one entry in Home Invasion regardless of the number of victims. The legislature titled the offense Home Invasion focusing on the entry aspect of the crime, rather than on the number of victims within."

The state, in the information filed against the defendant on February 29, 1988, charged the defendant in Count I and II with Home Invasion under 12-11(a)(2) which is infliction of intentional injury. In addition, the state charged the defendant with Home Invasion in Counts III and IV under 12-11(a)(1) which is threat of force while armed

with a dangerous weapon. At the close of the state's evidence, the defendant made a motion to consolidate counts I and II under 12-11, as well as III and IV. The rationale of the motion to consolidate was that to permit all four of these charges to stand would in effect allow the State to do indirectly what it could not do directly, i.e. try and convict the defendant of four offenses of Home Invasion based on the same course of conduct in a single entry. If in fact, the defendant could not be convicted of all four offenses, it stands to reason that he should not be separately charged with all four offenses. This has the appearance of "double dipping", a practice condemned in Illinois in People v. Green (1980) 83 Ill. App. 3d 982.

The State's evidence as presented on Count I was no stronger than the evidence that was presented against the defendant in Count II. Neither count required proof of a fact which the other did not. Blockburger v. U.S., 284 U.S. 299, 304 (1932). The fact that the jury

found the defendant guilty on Count I and not guilty on Count II raises a reasonable doubt as to the defendant's guilt on Count I. The same would be true of Count III and IV. People v. Carter, 19 Ill. App. 3d 21 (1974). The State's instructions #10 and #11 were given without objection, correctly state the two sub sections of Chapter 38, 12-11(a). The jury, by finding that the Defendant was guilty of violating the law as given in Instruction #10 with respect to Count I, had to find that the defendant intentionally caused injury to any person within the dwelling place (emphasis added). The jury then had to find that the defendant did not intentionally cause any injury to any person within the dwelling place in order to find the defendant not guilty on Count II (emphasis added). The jury, with respect to Count I and II, by their verdicts, made a determination that the necessary mental state present with respect to Count I was not present with respect to Count II. Since the mental states must be mutually

consistent, with respect to the identical charges of Home Invasion, the determination that one exists as in Count I and that the same mental state does not exist in Count II, is legally inconsistent. In the case of People v. Frias, 99 Ill.2d 193 at page 197 and 198, the Supreme Court of Illinois dealt with the question of what constitutes legally inconsistent verdicts.

> "The Appellate Court, in the case now before us, while stating that Illinois no longer requires consistence, either legally or logically, in jury verdicts, nonetheless held that where the crime of which the defendant was acquitted was an essential element of the crime for which he was convicted, the conviction can not stand." 109 Ill. App. 3d 888, 893 (1983).

At page 198 the Illinois Supreme Court in Frias states as follows:

> "The State points out that the 'essential element' test used by the Appellate Court falls squarely within the definition of "legal inconsistence."

People v. O'Malley, (1982) 108 Ill. App. 3d 923, 929 which states:

> "A legally inconsistent verdict has been defined as follows: 'verdicts of guilty of crime A but not guilty of crime B where both crimes arise out of the same set of facts are legally inconsistent

> when they necessarily involve the conclusion that the same essential element or elements of each crime were found both to exist and not exist.' People v. Murray (1975) 35 Ill. App. 3d 521 531, 340 N.E.2d 186."

In the Frias case, the defendant had been charged with two counts of murder and one count of armed violence. The jury found Frias not guilty of murder, however it found him guilty of armed violence based on having committed the murder while armed. The case involved a multi-count indictment with inconsistent verdicts being rendered in a single trial. The Frias Court acknowledged that there was a division of authority in cases where defendant is tried in a single trial on a multi-count indictment and the jury renders legally inconsistent verdicts. The Supreme Court of Illinois held at page 202, "we likewise hold that collateral estoppel must be applied in the case now before us." Further, the Court stated at page 202, "we would have to ignore the fact that in a related count in the same trial there has been a valid, finaljudgment of acquittal which

determined common issues essential to the conviction in both counts." On page 203, the Court stated as follows:

> "Summarizing, in this case collateral estoppel would prevent the conviction of armed violence if the two counts had been tried separately, it will also prevent conviction of armed violence if the cause is remanded for a new trial on that count alone. Therefore, logic would seem to require that collateral estoppel should also apply when the two counts are tried together in a single trial."

The Supreme Court of Illinois cited the case of People v. Pearson (1973) 16 Ill. App. 3d 543 in the Frias case found at 99 Ill.2d,page 203, the Supreme Court stated about the Pearson case that:

> The Appellate Court had before it inconsistent findings of guilty and not guilty. In Pearson, the defendant had been charged with two counts of aggravated assault and two counts of armed violence. All four counts arose out of the alleged firing of a hand gun at two police officers. The defendant was found guilty of each count of aggravated assault and not guilty of each count of armed violence."

The Court noted the possible remedies to legally inconsistent verdicts, suggested in People v. Hariston 46 Ill.2d 348, but also noted that the remedy of reversing legally

inconsistent verdicts of guilty and then setting a new trial on all counts, would not apply where the verdicts were legally inconsistent and were partially guilty and partially not guilty (emphasis added). At page 204, the Frias Court stated:

> "The Appellate Court pointed out the provisions of the Illinois 1970 Constitution prohibiting the appeals from judgment of acquittal (Ill. Const. 1970, Art. VI, Sec. 6) and held that the acquittal judgments stood as valid final judgments. Then applying collateral estoppel, The Appellate Court held that a new trial on the charges of aggravated assault alone was barred and required the reversal of conviction on those charges."

To remand this case and re-litigate the two charges in which the defendant was found guilty, as well as the lesser included offenses of battery and unauthorized entry, would offend both the Federal and State double jeopardy guarantees (U.S. Const., Amend.V: Ill.Const. 1970, Art. I, Sec. 10), Ashe v. Swenson (1970) 397 U.S. 436, 443, 444.

Therefore, as stated by the Illinois Supreme Court at page 204, in People v. Frias:

> "Under our constitution there can be no appeal of the acquittal of the charge of

murder. That acquittal stands as a valid, final determination of that issue. Since we do not have legally inconsistent guilty verdicts, we cannot follow the suggestion of Hariston that a reversal and a new trial on all counts is a proper remedy. Also, as in Pearson, collateral estoppel prevents the retrial of the armed violence count alone. To retry the defendant on that charge would unconstitutionally cause the defendant to re-litigate an essential element of that crime (murder) of which he had previously been acquitted. The appropriate remedy is therefore reversal of the armed violence conviction."

Recently, the United States Supreme Court had occasion to discuss the Double Jeopardy Clause. The United States Supreme Court held in Grady v. Corbin (1990) 495 U.S. 408, 109 L.Ed2d 548, 110 S.Ct. 2084, that if in order to establish an element of an offense charged in the later prosecution, the prosecution MUST PROVE CONDUCT that constitutes an offense for which the defendant has already been prosecuted, then the later prosecution is barred on double jeopardy grounds (emphasis added). In the case at bar, the defendant was charged with conduct under the Illinois Statute of Home Invasion, whereby under the proof there was only one entry into the

subject dwelling and one course of conduct. The defendant cannot under the Grady case be both Guilty and Innocent based on the same conduct (emphasis added).

Also, since the acquittal on counts II and IV on insufficient evidence were entered, it is no longer an appealable issue. The general rule for issues of this sort is that when an acquittal is based upon insufficiency of the evidence, jeopardy has attached and the defendant can't be retried. United States v. Scott, 437 U.S. 82, 98 S.Ct. 2187, 57 L.Ed.2d 65 (1978), Sanabria v. United States, 437 U.S. 54, 98 S.Ct. 2170, 57 L.Ed.2d 43 (1978). Furthermore, if a jury convicts on one count that the prosecution is not asking for but does not convict on the other count that the prosecution is asking for, it is impliedly an acquittal on the count of which they did not convict. Green v. United States, 355 U.S. 184, 78 S.Ct. 221, 2 L.Ed.2d 199(1957). Under this analysis the present defendant, would be twice placed in jeopardy since jeopardy had

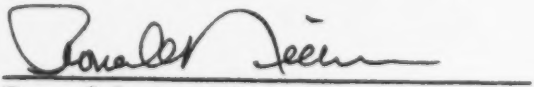
attached and an acquittal was entered on Counts II and IV. Defendant cannot be retried and the acquittal is not an appealable issue.

Since there is only one chargeable course of conduct and a single act as the basis for the Home Invasion charges and because of the fact that the jury has acquitted on that act by its verdict on Counts II and (IV) that acquittal stands as a final judgment on the issue. Frias, supra. It is legally inconsistent, and contrary to the plain meaning of the Illinois Home Invasion statute, to say that depending on the number of person inside, the defendant can be guilty as to some counts but not guilty as to other counts of Home Invasion when there is but a single entry and a single course of conduct. Grady supra.

CONCLUSION

The defendant asserts that the trial court was correct in holding that the Home Invasion Statute as charged against the defendant in this case permitted the jury to render legally inconsistent verdicts and it was proper to vacate the guilty verdicts in Counts I and III(IV). Collateral estoppel is embodied in the Fifth Amendment Guarantee against Double Jeopardy. The issue for this Court is the consequences of inconsistent findings of Guilty and Not Guilty arising out of a single course of conduct. Because the jury made findings legally inconsistent, a reinstatement of Guilty of Count I (it is noted that for some unexplained reason the State does not argue that Count III(IV) should also be reinstated) is barred by collateral estoppel as a form of double jeopardy.

Respectfully submitted,



Ronald A. Niemann
Admitted 6/14/82
U.S. Supreme Court

EXHIBITS

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EXHIBIT A

People v. Carpenter

221 Ill. App. 3d 58

THE PEOPLE OF THE STATE OF ILLINOIS, Plaintiff-Appellant, v. KEVIN L. CARPENTER, Defendant-Appellee.

Fifth District No. 5-88-0793

Reversed in part, vacated in part, modified in part and remanded.

Opinion filed September 23, 1991

Rehearing denied November 12, 1991

1. CRIMINAL LAW - *trial court erred in entering judgment n.o.v. based upon preceived inconsistencies in verdicts finding defendant guilty and not guilty of home invasion.* In a prosecution for residential burglary and home invasion arising from an incident in which the defendant forced his way into the residence of his ex-wife's companion, the trial court improperly entered a judgment n.o.v. following the jury's acquittal on two counts of the information charging the defendant with home invasion while finding the defendant guilty of two additional counts of home invasion, where

the jury verdicts were not legally inconsistent because four separate verdict forms charged the defendant with an element of home invasion against only one victim, rather than using the statutory language of "any person or persons," and the jury properly found that the defendant intentionally injured the companion while armed with a dangerous weapon, but did not intentionally injure his ex-wife.

2. CRIMINAL LAW-*defendant was not prejudiced by issues instruction requiring State to prove intentional injury while armed with dangerous weapon-home invasion.* Where section 12-11(a)(1) of the Criminal Code of 1961, setting forth the offense of home invasion, requires the State to prove the use of force or that threat of the imminent use of force while armed with a dangerous weapon, and the issues instruction given in the defendant's case required the State to prove an intentional injury while armed with a dangerous weapon,

the instructions placed a greater burden on the prosecution than the statute required and therefore did not prejudice the defendant, and the waiver rule applied to preclude defendant from asserting the argument on appeal because the defendant did not object at trial on the specific ground that the elements of the offense were misstated.

3. CRIMINAL LAW-*defendant would not be subjected to double jeopardy by reinstatement of guilty verdict and remand for resentencing on count of home invasion alleging defendant intentionally injured ex-wife's companion.* Where the trial court abused its discretion in entering a judgment n.o.v. following the jury's guilty verdict on a count, of the information alleging that the defendant intentionally injured the companion of the defendant's ex-wife, the error was remedied on appeal by reversal fo the court's order, reinstatement of the jury's verdict on that count, entry of judgment, and remand for

resentencing; and the defendant would not be subjected to double jeopardy by the reinstatement where the entry of the judgment n.o.v. was not based on any insufficiency of evidence as to any of the elements of the offense.

4. CRIMINAL LAW-*mislabelling jury verdict forms did not warrant vacating guilty verdict-home invasion.* Although the trial court erred in vacating the jury verdict on one count of the information on the basis that the jury verdict form was misidentified as another count, because the verdict from properly indentified the victim by name and set out the basis for the charge, it was unnecessary to reverse the ruling of the trial court because the appellate court reinstated the guilty verdict on another count of the complaint which was improperly overturned by a judgment n.o.v. and a second conviction for home invasion cannot stand, regardless of the number of victims.

5. CRIMINAL LAW-*State had right under Supreme Court Rule 604(a) to appeal entry of judgment n.o.v. effectively dismissing State's case-home invasion.* Although a not guilty judgment based upon the perceived legal inconsistency of the jury's verdicts is not expressly mentioned in Supreme Court Rule 604(a) or section 114-1 of the Code of Criminal Procedure of 1963, applicable to the right of the State to appeal the dismissal of an information, the trial court's entry of a judgment n.o.v. setting aside the jury's guilty verdict on one count of the complaint charging the defendant with home invasion was in effect a dismissal and not an acquittal, thereby permitting the State to perfect an appeal and invoke the jurisdiction of the appellate court.

6. CRIMINAL LAW-*convictions for battery and criminal trespass to residence were vacated as lesser-included offenses of reinstated guilty verdict on home invasion charges.*

Appeal from the Circuit Court of Jefferson County; the Hon. Lehman Krause, Judge, presiding.

Kathleen M. Alling, State's Attorney, of Mt. Vernon (Kenneth R. Boyle, Stephen E. Norris, and Gerry R. Arnold, all of State's Attorneys Appellate Prosecutor's Office, of counsel), for the People.

Ronald A. Niemann, of Centralia, for appellee.

PRESIDING JUSTICE RARICK delivered the opinion of the court:

Kevin Carpenter was charged in the circuit court of Jefferson County with four counts of home invasion and one count of residential burglary. A summary of the facts adduced at trial as follows. The defendant forced his way into the residence of Ted Steele, with whom the defendant's ex-wife, Debra Carpenter, was living. The defendant was armed with a shortened baseball bat. Debra went to the kitchen to call the police,

but the defendant followed and smashed the phone wit the bat. Defendant then turned to Steel, who was standing behind him, ans struck Steele. Debra the grabbed the bat and struggled with the defendant. Defendant released the bat, but when he did, it struck Debra.

Counts I through IV of the information charged the defendant with home invasion, while count V charged the defendant with the offense of residential burglary. Count I alleged defendant intentionally injured Ted Steele. Count II alleged defendant intentionally injured Debra Carpenter. Count III alleged defendant used force against Debra Carpenter while armed with a dangerous weapon. Count IV alleged defendant used force against Steel while armed with dangerous weapon. Count V alleged that defendant knowingly and without authority entered Steele's residence with the intent to commit criminal damage to property in an amount over $300.

At the conclusion of the State's presentation of evidence, defendant moved for dismissal of count V, charging residential burglary. Defendant argued that no evidence had been presented that defendant entered Steele's residence with intent to commit a felony. In response the court only stated, "I'm going to order Count V stricken."

The jury was instructed on counts I through IV and on the lesser-included offenses of battery and criminal trespass to a residence (Ill. Rev. Stat. 1987, ch. 38, pars. 12-3, 19-4). However, th verdict forms given to the jury were mislabelled: the verdict form for count III was labelled "(Count IV)," and the verdict from for count IV was labelled "(Count III)." In addition, although two separate instructions properly defined the alternative ways of committing home invasion, i.e., use or threat of force while armed with a dangerous weapon (counts III and IV) or intentional injury (counts I and II))Ill. Rev.

Stat. 1987, ch. 38, pars. 12-11(a)(1), (a)(2); Illinois Pattern Jury Instructions, Criminal, No. 11.21 (2d ed. 1981) (hereinafter IPI Criminal 2d)), the issues instructions for counts III and IV did not correspond to the definitional instruction or the language of the statue for those counts.

The offense of home invasion is set forth in section 12-11(a) of the Criminal Code of 1961 (Ill. Rev. Stat. 1987, ch.38, par. 12-11(a)) and provides:

> "A person who is not a peace officer acting in the line of duty commits home invasion when without authority he or she knowingly enters the dwelling of another when he or she knows or has reason to know that one or more persons is present and
>
> (1) While armed with a dangerous weapon uses force or threatens the imminent use of force upon any person or persons within such dwelling place whether or not injury occurs, or
>
> (2) Intentionally causes any injury to any person or persons within such dwelling place." (Emphasis added.)

In the instant case, two definitional instructions for home invasion were given. On

definitional instruction mirrored the language of section 12-11(a)(2) (intentional injury) and corresponded to counts I (Steele) and II (Carpenter) of the information.

Another definitional instruction mirrored the language of section 12-11(a)(1) (use or threat of force while armed) and corresponded to counts III (Carpenter) and IV (Steele) of the information. However, the issues instructions for counts III and IV required the State to prove, inter alia:

> "Fourth:That [defendant] intentionally caused an injury to Ted Steele, a person within the dwelling place;
> and Fifth: That he was armed with a dangerous weapon."

The issues instruction for Count IV, involving Debra Carpenter, similarly required the State to prove intentional injury while armed with a dangerous weapon. These issues instructions for counts III and IV, therefore, erroneously required the State to prove that defendant committed an intentional injury while armed with a dangerous weapon, rather than requiring

the State to prove that defendant used force or threatened the imminent use of force while armed with a dangerous weapon. See IPI Criminal 2d No. 11.22.

On these instructions, the jury found defendant guilty of two counts of home invasion involving Steele (counts I and IV of the information), but not guilty of the two counts involving Carpenter (counts II and III of the information). Defendant was also found guilty of the lesser-included offenses of battery and criminal trespass to a residence. At that time, the circuit court entered judgment only on count IV ("Count III" on the verdict form).

Defendant filed a post-trial motion, arguing, inter alia, that the guilty verdicts on the home invasion counts should be vacated because they were legally inconsistent with the not guilty verdicts.

After taking the cause under advisement, the circuit court entered an order on November

7, 1988, which: (1) entered judgments of guilty on the jury's verdicts on the battery and criminal trespass to residence charges; (2) vacated the judgment of guilty on count IV charging home invasion (mislabelled count III); (3) found the jury's verdicts on the four counts of home invasion to be "legally inconsistent" and therefore entered a judgment of not guilty verdict, count I; and (4) "found" that the defendant could not be retried on the charge of home invasion.

The State filed a motion to reconsider. After argument, the following colloquy occurred:

> "BY THE COURT: *** I have four counts of Home Invasion, two verdicts of not guilty. I don't see how you can retry on those two counts. The other count is incorrect. I cannot take that and let it stand as a judgment of guilty. That being three out of four, I don't see how I can retry it. If he is guilty at all, he is guilty of more than one Count or he is not guilty. That is the basis of my opinion briefly.
>
> ROBERT CREGO, ASS'T STATE'S ATTY: Your Honor, in light of the Court's ruling thereon, is the Court stating that the

> evidence was insufficient to find the defendant guilty beyond reasonable doubt[?]
>
> BY THE COURT: No.[,] that is not my problem. I had the problem of the verdicts"

The State's motion to reconsider was denied.

The Court subsequently sentenced defendant, on the convictions for battery and criminal trespass to a residence, to concurrent one-year terms of probation and a term of periodic imprisonment, and ordered him to pay a fine of $800.00 and make restitution in the amount of $556. The State appeals.

On appeal, the State argues that the verdicts were not legally inconsistent because considerations of legal inconsistency do not arise where only one offense is charged under different theories and the jury convicts on some counts but acquits on others. The defendant maintains on appeal, as he did in the court below, that the verdicts were legally inconsistent because the jury had to find that a particular mental state both did

and did not exist. Specifically, defendant contends that to find him guilty on counts I and IV, the jury had to find that he knowingly entered the dwelling and intentionally injured any of the persons therein, but to acquit him on counts II and III the jury had to find that he did not intentionally injure any person therein. Despite the analytical appeal of defendant's argument, we are not persuaded.

"Legally inconsistent verdicts are verdicts where the same essential element of each crime is found to exist and not to exist and both crimes arise out of the same set of facts.[Citations.] Legally inconsistent verdicts are invalid and the convictions must be reversed." (People v. Sandy (1989), 188 Ill. App 3d 833, 845, 544 N.E.2d 1248, 1255) This case, however, does not involve legally or factually inconsistent verdicts.

1. Defendant's argument that the jury returned legally inconsistent verdicts focuses on the phrase, "any person or persons," as

used in the alternative definitions of home invasion is sections 12-11(a)(1) and (a)(2) and the definitional instructions given to the jury (IPI Criminal 2d No. 11.21). However, all of the issues instructions and verdict forms given to the jury named one victim only for each count and did not use the phrase, "any person or persons." It is apparent that the jury found defendant guilty of home invasion for his actions toward Ted Steele (counts I and IV of the information), because he intentionally injured Steele while armed with a dangerous weapon, but not guilty of home invasion for his actions toward Debra Carpenter (counts II and III of the information), because he did not intentionally injure her.

This court therefore reverses the circuit court's ruling that the jury's verdicts on the home invasion counts were inconsistent.

2. We note that the fact that the issues instruction for count IV did not

accurately reflect the elements of the offense of home invasion as set out in the statute did not prejudice defendant. The State in this case proved more than what was required by the statute. Whereas section 12-11(a)(1) requires the State to prove the use of force or the threat of the imminent use of force, while armed with a dangerous weapon, the issues instructions for counts III and IV required the State to prove an intentional injury, while armed with a dangerous weapon. Thus, in the instant case, involving defendant's striking of Ted Steele with a baseball bat, for the guilty verdict on count IV it appears the State proved (intentional injury) more than was necessary under section 12-11(a)(1) (use or threat of force). See Killian v. United States (1961), 368 U.S. 231, 257-58, 7 L. Ed. 2d 256, 273-74, 82 S. Ct. 302, 317 (inconsistent paragraphs in instruction not prejudicial because latter paragraph exacted higher standard of proof than law required);

People v. Upton (1987), 151 Ill. App. 3d 1075, 1079, 503 N.E. 2d 1102, 1104 (instructions placed greater burden on prosecution that statute required); see also People v. Pierce (1974), 56 Ill. 2d 361, 308 N.E.2d 1102, 1104 (error which favors defendant, and of which he cannot complain, is harmless).

In addition, we note that while defendant objected to the giving of the issues instructions, he did not object on the ground that the elements of the offense were misstated. Defendant complained that the instructions should not identify a specific victim, but rather they should parallel the language of the statute, "any person or person." Defendant also complained that the jury should be instructed on only one count of home invasion, because defendant could only be convicted of one count. The court overruled defendant;s objections. Not only did defendant not raise this specific objection at trial, but defendant proferred an issues

instruction which made the same misstatement of the of the elements of the offense. We note that neither party has discussed the misstated jury instruction in their briefs. We therefore conclude that the waiver rule would prohibit defendant from complaining about the misstated instructions. 134 Ill. 2d R. 341(e)(7) (failure to argue in briefs results in waiver); People v. Jeffrey (1981), 94 Ill. App. 3d 455, 468, 418 N.E.2d 880, 891 (appellant must show he raised issue at instructions conference); People v. Belcher (1946), 395 Ill. 348, 352, 70 N.E.2d 201, 202 (defendant cannot complain of error in instruction when his own instruction contained some error).

Finally, we note that the error in the instructions for count IV did not prejudice defendant in light of this court's decision, infra, to allow the circuit court's decision to vacated the judgment of guilty on count IV

to stand and to reinstate the guilty verdict on count I and enter judgment on that count.

3. The next issue is the appropriate remedy for the court's error in finding the verdicts to be inconsistent. The State acknowledges that there can only be one conviction for home invasion, regardless of the number of victims. (People v. Hawkins (1984), 125 Ill. App. 3d 520, 466 N.E.2d 299.) The State therefore requests that this court reinstate only the guilty verdict on count I and remand for resentencing on that count. Defendant maintains that to vacate the trial court's order of dismissal and to remand this case for retrial would subject him to double jeopardy. We do not agree. There is no need for a second trial. The court's order entering a judgment of not guilty on count I notwithstanding the guilty verdict was not based on any insufficiency of evidence as to any of the elements of the offense, but rather upon an incorrect conclusion of law. Reversal

of the trial court's order and reinstatement of the jury's verdict will therefore not subject the defendant to double jeopardy. (People v. Mink (1990), 141 Ill. 2d 163, 173, 565 N.E.2d 975, 979; United States v. Wilson (1975), 420 U.S. 332, 352-53, 43 L. Ed. 2d 232, 247, 95 S. Ct. 1013, 1026.) In Mink, the supreme court stated:

> "[W]here the jury returns a verdict of guilty but the trial court thereafter enters a judgment of acquittal notwithstanding the verdict, the double jeopardy clause does not prohibit the State from appealing the judgment of acquittal. If the appeal is successful and the appellate court concludes that a judgment of acquittal was improper, the criminal defendant is not required to submit to a second trial; the error of law may be corrected on remand by simply reinstating the jury's verdict." 141 Ill. 2d at 177-78, 565 N.E.2d at 981.

We therefore reinstate the verdict of guilty on count I, enter judgment on that count, and remand for sentencing on that count.

4. With respect to count IV, although a second conviction for home invasion in this

case cannot stand (Hawkins, 125 Ill. App. 3d 520, 466 N.E.2d 299), we nevertheless believe it is necessary to address the circuit court's order vacating the judgment of guilty on that count.

The circuit court did not give a reason for its decision to first vacate the judgment of guilty on count IV (mislabelled count III) before entering judgment notwithstanding the guilty verdict on count I. From the colloquy at the hearing on the State's motion to reconsider, excerpted above, it appears the court believed the mislabelling of the jury verdict forms warranted it.

We do not believe the mislabelling of the verdict forms warranted rejection of the jury's verdict on count IV. Each verdict form specified the charge to which it applied. The verdict from in question stated: "We, the jury, find the defendant Kevin Carpenter Guilty of the offense of home invasion, having intentionally caused injury to Ted Steele

while armed with a dangerous weapon. (Count III)," This verdict form misidentified the charge as count III instead of count IV, and the verdict form for count III of the information was correspondingly misidentified as "Count IV." However, because the basis for each charge was set out in these verdict forms, identifying the victim by name, we believe these errors were insufficient reason to warrant vacating the jury's verdict of guilty of home invasion on count IV.

Nevertheless, in light of our decision to reinstate the judgment of guilty on count I, it is unnecessary to reverse the circuit court's fuling which vacated the judgment of guilty on count IV.

5. As a final matter, we not we ar duty bound to consider whether this appeal has been properly taken so as to invoke the jurisdiction of this court. Bell Federal Savings & Loan Association v. Bank of

Ravenswood (1990), 203 Ill. App. 3d 219, 223, 560 N.E. 2d 1156, 1158-59.

Our constitution provides that "after a trial on the merits in a criminal case, there shall be no appeal from judgment of acquittal." (Ill. Const. 1970, art. VI, sec. 6.) Furthermore, Supreme Court Rule 604(a) provides:

> "(1) When State May Appeal. In criminal cases the State may appeal only from an order or judgment the substantive effect of which results in dismissing a charge for any of the grounds enumerated in section 114-1 of the Code of Criminal Procedure of 1963; arresting judgment because of a defective indictment, information or complaint; quashing an arrest or search warrant; or suppressing evidence." 134 Ill.2d R. 604(a)(1).

Before the record was filed in this cause, this court entered an order directing the State to show cause why this appeal should not be dismissed for lack of appellate jurisdiction. The State responded, arguing, "Since the basis of the order was the court's belief that the verdicts were legally inconsistent, and not the evidence was

insufficient, the trial court's ruling did not result in an acquittal." (Emphasis in original.) The State further argued, "The effect of the trial court's order was to dismiss the counts of the information charging home invasion."

Section 114-1 of the Code of Criminal Procedure of 1963 sets forth various grounds upon which the trial court may base a dismissal of an indictment, information, or complaint. (Ill. Rev. Stat. 1987, ch. 38, par. 114-1.) The type of order in this case, a not guilty judgment based upon the perceived legal inconsistency of the jury's verdicts, is not expressly mentioned in either Rule 604(a) or section 114-1. However, the supreme court has determined that when Rule 604(a) made explicit the right of the State to appeal on grounds set forth in section 114-1, it was not intended to reduce the range of the State's right to appeal, but instead it was intended to make clear that the State had a right to

appeal from dismissals on any of the various grounds set forth in section 114-1. (People v. Love (1968), 39 Ill. 2d 436, 439-40, 235 N.E. 2d 819, 821-22.) In Love, the supreme court stated:

> "The redrafting [of Rule 604(a)] was not intended to extinguish the People's right to appeal from judgments the substantive effect of which was to dismiss indictments on grounds not specified in the rule ***." Love, 39 Ill. 2d at 440, 235 N.E. 2d at 822.

In People v. Oswald (1982), 106 Il. App. 3d 645, 435 N.E. 2d 1369, the State sought to appeal from orders granting supervision to defendants based upon their pleas of guilty and terminating the supervision instanter. The State contended that an order granting supervision and terminating it instanter is in effect a dismissal, permitting an appeal under Rule 604(a).

In considering the defendant's jurisdictional objections, the Oswald court initially noted that there can be no appeal from a judgment of acquittal after a trial on

the merits (Ill. Const. 1970, art. VI, sec. 6). However, the court noted that none of the factual elements of the offenses charged were resolved in defendant's favor. Defendants were discharged on grounds unrelated to their guilt and despite the evidence of their guilt. The court concluded that such a dismissal of the charges is not a judgment of acquittal. Oswald, 106 Ill. App. 3d at 646-47, 435 N.E. 2d at 1371.

In this case, the jury found defendant guilty of the offense of home invasion on the charges naming Ted Steele as victim. Moreover, the trial court did not base its decision to enter judgment notwithstanding that verdict on lack of evidence of defendant's guilt, but rather on the perceived legal inconsistency of the verdicts. Accordingly, this court concludes that the circuit court's order with respect to count I in this cause did not constitute an acquittal,

and thus this court believes it has properly exercised jurisdiction in this appeal.

6. For the foregoing reasons, we reverse the circuit court's finding of inconsistent verdicts. As a result, with respect to count I of the information, we vacate the circuit court's judgment of not guilty notwithstanding the jury verdict of guilty, reinstate the verdict of guilty of home invasion in count I, enter judgment of that count, and remand for sentencing on that count. Finally, we vacate the convictions and sentences for battery and criminal trespass to a residence to a residence, because they are lesser-included offenses of home invasion.

Reversed in part; vacated in part; judgment of guilty entered on count I; and remanded in part.

WELCH and GOLDENHERSH, JJ., concur.

EXHIBIT B

72990

ILLINOIS SUPREME COURT
JULEANN HORNYAK, CLERK
SUPREME COURT BUILDING
SPRINGFIELD, ILL. 62706
(217) 782-2035

February 5, 1992

Mr. Ronald A. Niemann
Niemann and Parker
830 E. Noleman
P.O. Drawer G
Centralia, IL 62801

No. 72990 - People State of Illinois, respondent, v. Kevin L. Carpenter, petitioner. Leave to appeal, Appellate Court, Fifth District

The Supreme Court today DENIED the petition for leave to appeal in the above entitled cause.

The mandate of this Court will issue to the Appellate Court on February 27, 1992.

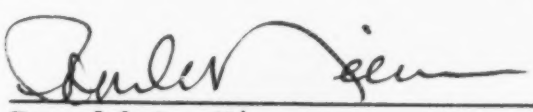
PROOF OF SERVICE

Ronald A. Niemann, Attorney for Applicant-Petitioner herein, being duly sworn on his oath, certifies that on the 29 day of May, 1992, the foregoing Amended Petition for Writ of Certiorari was served upon the following parties of record:

Hon. Gary Duncan
State's Attorney
Jefferson County Courthouse
Mt. Vernon, IL 62864

Kenneth R. Boyle
Director
Stephen E. Norris
Depury Director
Gerry R. Arnold
Staff Attorney
Office of the State's Attorneys
Appellate Prosecutor
Rt. 15 East, P.O. Box 2249
Mt. Vernon, IL 62864

Service was had by enclosing in an envelope addressed to the above parties at the addresses disclosed, postage fully prepaid and by depositing said envelope in the United States Post Office mail box at Centralia, Illinois.



Ronald A. Niemann
NIEMANN and PARKER
830 E. Noleman
P.O. Drawer G
Centralia, IL 62801
(618) 533-0466

Subscribed and Sworn to before me this 29 day of May, 1992.

Mary Lynn Koller
Notary Public

"OFFICIAL SEAL"
Mary Lynn Koller
Notary Public, State of Illinois
My Commission Expires 8/16/95